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THE CAUSE AND CURE OF MOB VIOLENCE.

The Omaha riot, resulting in the lynching of a negro charged with a horrible crime, and the burning of the courthouse, is only one of the many recent warnings of the present uncertain and volcanic conditions of the substructure of society which threatens to involve many cherished institutions of government in ruin.

It will not do, by the study of mere surface indications, to ascribe such occurrences to "mob psychology" or "race prejudice," or to the natural reaction from the high tension of the popular mind created by the war. Of course, all of these elements are factors more or less important. But they are not the essential factors. Some mobs have been organized in cold blood; in many cases there has been no race issue whatever; and the war, if it has had any effect, has only tended to stir the members of the mob to more desperate deeds.

Fundamentally, the real cause for the people ever taking the law into their own hands is the intense conviction that justice has been outraged and the rights of the victims are unrecognized by law or undefended by authority. The mob spirit, though often depicted by the cartoonists as a wild beast, has frequently its beginning in the purest and highest motives of which the mind of man is capable. The sense of outraged justice when an innocent girl is criminally assaulted, for instance, cries aloud for the immediate punishment of the wrongdoer. If that punishment were always certain and sufficient, if the man of the street knew that the arrest of the wrongdoer would lead to his prompt conviction and proper punishment, he would be satisfied to let the law take its course. But if he believes that the law is ineffective and that the prisoner is likely to escape the punishment he so justly merits, the awful passion, created by the act, is not quieted and the man who sees or is affected by it becomes a temporary maniac under the awful leash of it and the turbulence of his spirit will not subside until the wrongdoer is punished. It serves no purpose to argue that mobs are ignorant, tyrannical and unreasonable. The point is to find out how its members were transformed from quiet, law-abiding citizens to wild hyenas in a moment.

Whatever morbid sentimentalists and idle dreamers may think about it, the cry of the human soul for the punishment of the wrongdoer is not the beastly passion of revenge it is often alleged to be, but the divine passion for justice, taking, it is true, in the case of mob violence, a most crude form of expression. This proposition is easily proven by the fact that those whose feelings are most affected by an act of gross injustice are not always the injured parties themselves nor those in any manner connected or related to them. In these disinterested persons, at least, the desire is to see justice done. Now when is this sense of justice satisfied? Never until the guilty party has paid or suffered in a manner commensurate with the injury he has caused. An eye for an eye, and a tooth for a tooth is divine law and was not abrogated by the Sermon on the Mount. That great deliverance of the Christ was a picture of ideal conditions in a world without sin. It was not intended to change Moses' law but rather to show the necessity for that law so long as sin and wrongdoing exist in the world. Its ideals may still properly represent the highest summits of Christian experience, but it would be suicidal to society and contrary to human and divine law, to apply it to present conditions in the world.

The "sword of the magistrate" is still the sword of God, and men who seek to dull the edge of that sword strike at the very heart of society. The movement to abolish capital punishment, and the wishy-washiness of some trial judges in seeking to avoid their duty to God and society in

passing sentence upon the criminal, has had much to do, not only with the increase of crime, but with the unrestrainable passions of many good citizens in seeking to do justice where the law refuses to do it.

Two years ago the Missouri legislature abolished capital punishment and only a few months ago the same legislature had to be called in special session to repeal it. Why? Because of the number of sheriffs and court officers who were being murdered by thieves and robbers who had nothing to fear in the way of additional punishment by killing the sheriff in the attempt to escape. In one case, at Nevada, Mo., a highway robber killed the sheriff in making an attempt to secure his liberty. He confessed that he had not hesitated to kill the sheriff because the punishment for murder was no greater than for the offense for which he was arrested. So great was the public feeling in this case that even business men and reputable citizens joined in the mob which took the murderer from the jail and lynched him. Then, everywhere, from every corner of the state, came the demand for the restoration of the death penalty.

The first essential, therefore, to any essential system of law, which will satisfy the natural human demand for justice, is that the punishment shall fit the crime. This punishment should not be greater than the crime, as was the case in respect of many offenses at the common law, since that raises a feeling of sympathy for the offender. But it is just as essential that the punishment shall not be less than the crime. When a murder is committed in cold blood, the sense of justice will never be satisfied in any normal mind until the offender's life is also taken. This is not revenge; it is justice. Equality is equity. One man ought not to be allowed to enjoy life when he has deliberately deprived another of the same privilege. Every man ought to be willing to submit to the same conditions which he deliberately forces upon another.

In the second place, punishment for crime should not only be sufficient; it should be certain. In the Omaha incident a police officer declared that the high feeling against the negro who had been lynched had been increased, if not created, by the fact that many such offenses had recently been committed in Omaha and those guilty of the offenses had escaped punishment in most cases. Without accepting this implied criticism of the Omaha courts as just, every lawyer is willing to admit that the present administration of the criminal law is very ineffective. This is due sometimes to inexperienced prosecuting officers, sometimes to undue technicalities in the procedural law, and sometimes to the incompetency of either judge or jury. But whatever may be the cause of the failure of the administration of our criminal law in bringing guilty men to justice, it should be the serious concern of every citizen to increase in every way possible the effectiveness of the criminal law. The judges should be learned lawyers and free from political influences. The prosecuting attorneys should be experienced practitioners and given every assistance possible and proper to detect crime and bring the guilty parties to justice. Above all, the legislature of the several states should remove the outworn technicalities of pleading and procedure of the criminal law which serve no purpose to protect the innocent but often enable the guilty to escape.

Above all things the law itself, its principles, its sanctions, its administration, must be exalted. The people must be led to look at it as a thing apart, to cherish it as the very foundation of their liberties and to reverence it as the divine agency of national peace. But to secure respect for the law the law itself must be made respectable; and this is the supreme duty of the lawyers.

In what we have said, we have not sought to justify mob law. The thing is as hideous as smallpox. It is a disease of the body politic and we have here merely sought to direct our thought into a search for the cause of the disease rather than into a futile attempt to remove the pustular eruption it has caused.

NOTES OF IMPORTANT DECISIONS.

IS CAVEAT EMPTOR ANY LONGER A RULE OF LAW?—One difficulty with judge-made law—and that is what the common law is—is the uncertainty of its application. Instead of definitely abandoning a rule as the legislator does by means of a repealing statute, the courts, when they no longer desire to adhere to a rule of their own making, begin to whittle it away by so-called distinctions. This is what is being done to the old common law rule of *caveat emptor*. How far the courts have gone in destroying the old rule, which more than any other, embodied the individualistic conception of the common law, is to be noticed in the recent case of Forte v. Wilson, 178 Pac. 430.

In the Forte case, the plaintiff, a farmer, traded his farm for a general store, a transaction very often "put over" by speculators at a farmer's expense. After the purchase had been completed the plaintiff found that the goods inventoried only $2,500 in value, whereas the defendant had assured plaintiff that they would inventory between $9,000 and $10,000. The plaintiff sought a rescission of the contract, which had not then been fully performed. It appeared that the store was open to the plaintiff's inspection, that plaintiff had abundant opportunity to examine the goods and not only did examine the goods but had others examine the stock also. There was no concealment and the only misrepresentation consisted of "puffing" or exaggerating the value and quality of the goods. Plaintiff examined many articles which showed on their face that they were soiled and out of date, such as hats and clothing. In spite of this fact, however, the Supreme Court of Kansas declares that the examination of the goods by the plaintiff did not relieve defendant of his responsibility for his misleading exaggerations. On this point the court said:

"The attorney for the defendants concedes that the defendants are bound by the finding of the District Court relating to the representations alleged to have been made, but he directs attention to the admissions of the plaintiff that he not only had abundant opportunity for inspection, but that he inspected the goods himself as long and as often as he desired, and that he had others inspect them. Authorities are cited to the effect that the rule of *caveat emptor* ordinarily applies to a sale for general purposes of common articles of merchandise open to inspection, that means of knowledge is the equivalent of knowledge, that a buyer cannot be heard to say he relied on representations as to facts when the facts themselves were before his eyes, and that a buyer distrustful of his own judgment should take a warranty.

"The authorities cited are either inapplicable to the facts, or else they do not represent the best modern legal thought. The defects of which the buyer complains were not obvious; that is, they were not apparent on casual observation. An examination was required. A brief examination might have been sufficient to satisfy an expert dealer familiar with the capacity and disposition of the public to absorb such goods, but investigation was necessary. The buyer made a partial investigation. The seller might have kept silent, had he so desired, and might have allowed the buyer to improve or not, as he desired, his opportunity for investigation. The seller, however, chose not to keep silent. He not only made profert of the goods for inspection, but he made profert of his own statements of fact, for such weight as they might have. The buyer accepted the statements as true, and acted on them. Under such circumstances the seller is bound by his statements. He cannot insist that the buyer be held to the results of an inspection made, or which might have been made, because he was not content to leave the buyer to abide by such results. He induced the sale by other means, and will not be heard to say that such other means ought not to have prevailed."

If the Golden Rule is to be substituted for the rule of *Caveat Emptor*, then the court should so declare. If it is the seller's duty to make clear all the patent as well as all the latent defects in his goods; if a salesman is no longer at liberty to overcome the resistance of a prospect's refusal to buy by a little exaggeration concerning matters that are equally open to inspection by both parties, then business men and their advisors are entitled to know it.

There is no doubt that *caveat emptor* is no longer a seller's protection. Indeed the wording of the rule might well be changed to *caveat vendor*, for, under the recent decisions, it is the vendor who must be careful that no statement of his, even as to a matter plainly open to the buyer's inspection, shall be capable of even the slightest misconstruction. Otherwise a perfectly valid sale may be set aside.

IS AN AGREEMENT TO ANSWER FOR THE DEBT OR DEFAULT OF ANOTHER WITHIN THE STATUTE OF FRAUDS WHERE THE PROMISSOR IS INTERESTED IN THE PAYMENT OF THE DEBT?—No section of the Statute of Frauds has been more strictly construed than that section which relates to "a special promise to answer for the debt, default or miscarriage of another person." The phraseology of this statute is so broad that it would seem to include every contract wherein one person agrees to answer for another's debt. The courts, at the very outset, however, excluded all cases where the promissor was in effect promising to pay his own debt or where he made a promise absolutely to pay a debt created or to be created by another. In other words the statute was held to apply only to contracts to become conditionally, not primarily, liable for another's debt.

The courts also have limited the operation of the statute to promises made to the creditor. If the promise is made to the debtor himself, it is not within the statute. (Eastwood v. Kenyon, 11 A. & E. 438; Wald's Pollock on Contracts (3rd Ed.), p. 170). It has also been held that the promise to answer for the debt of another must be a promise to pay out of the promissor's own estate and not to pay the debt out of the debtor's own funds. Thus, if A promises to pay B a debt due B from C out of funds in his hands belonging to C, the promise is not within the statute. (Estabrook v. Gebhart, 32 Oh. St. 415).

So also it has been held that with regard to the one who may make the promise, as well as the one to whom such a promise is made, there is a distinction to be observed. Not every contract wherein one makes a promise to pay another's debt is within the statute, according to some recent decisions, but only where the promise is made by one who has no personal concern in the debt.

This last distinction is sought to be applied in the recent case of Cincinnati Traction Co. v. Cole, 258 Fed. 169, in which the court reviews the whole subject of the construction of this section of the Statute of Frauds. In this case, Cole, the plaintiff below, a dealer in lumber, sued the Cincinnati Traction Company on a parol promise to "pay the account of the Hefflin Construction Company if the Company does not pay it." The Hefflin Construction Company had contracted to do work for the Traction Company and had purchased lumber for the job from Cole which had not been paid for. Cole refused to furnish the Construction Company with any more lumber unless the old account was settled, which was the occasion for the Traction Company to make its promise to see that the plaintiff's debt was paid if they would furnish more lumber for the job. The counsel for the Traction Company insisted that every conditional promise to answer for the debt of another was within the statute. This the Court of Appeals (6th Cir.) declared was too broad an assertion. After showing the limitations on this rule, to which we have already called attention, the court proceeded to argue that the statute did not apply to conditional promises to answer for another's debt when the promissor, as in the principal case, had a personal concern in the payment of the debt. On this point the court said:

"The interest prompting a legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern therein. Where the promissor has a personal concern in the debt, the making of the promise is not dependent solely on the testimony of witnesses. The fact of having such concern is a corroborating circumstance in support of testimony tending to show the making of the promise. It renders its making more likely."

The court is troubled to find authority for its position in cases where the promise to pay is made after the creation of the debt. There are many cases which hold that where a contractor quits, a promise by the owner of the building to pay the sub-contractor for future work if he will go on with the work is not within the statute. Davis v. Patrick, 14 U. S. 479; Crawford v. Edison, 45 Oh. St. 239. In these cases, however, the courts practically regard the promise as a primary undertaking of the promissor to pay absolutely although in form the promise is conditional.

In the principal case it appeared that plaintiff was entitled to a lien on the promissor's buliding for the material furnished and that promissor made the promise to pay for material already furnished to the Hefflin Construction Company, in order to avoid the placing of a lien on its property. This motive on the part of the promissor, the court argued, showed a special concern in the payment of the Hefflin Company's debt. On this point the court said:

"The statute, according to its thought, covers only a promise to answer for the debt of a third person by one who has no personal concern in the debt. It does not cover a promise by one who has a personal concern therein; and in such a case as this the promissor has such

concern. His property is obligated for it, and by its payment will be relieved of the obligation. If, then, such is the true ground thereof, it follows that in any case where the promissor has a personal concern in the debt, whatever may be the basis thereof, the promise is not within the thought of the statute, and hence not within the statute".

The court's argument is, to our mind, attenuated. The discussion is unnecessarily prolonged for, the further the court goes the deeper into the mire it sinks. It admits that the reasons assigned are new; that the opinion blazes a new trail. The inherent error in the court's argument is its priori position that the "soul" of this section of the "Statute of Frauds" is distinct from its "etymology" and that there is a triology of conditions implied in the statute which are discoverable when we get into the "soul" of the section: First, as to the person to whom the promise is made; second, as to the funds out of which payment is to be made; and third, as to the person who may make the promise. The court's insistence on the third element of this trilogy because the other two are true is illogical in the extreme. We are always afraid of "trilogies" or any other plausible catchword classification. There is nothing in the "words" or the "soul" of this Statute, whatever that last expression may mean, that limits its operations only to persons who have no "concern" in the debt. Such a limitation introduces a new element of great uncertainty into the law. The great weight of authority does not sustain the court in its reasoning. There are only two alternatives in a case like this. If the promise, although conditional or collateral, is in effect a promise to answer for one's own debt, then the promise is an original one and not within the statute. If on the other hand, neither the promissor nor his property are responsible for the debt, the promise is collateral and must be in writing, apart from any considerations of "personal concern" in the debt.

What would the court do with a promise of a father to answer for the debt of a son in order to avoid some personal disgrace that might attach to non-payment? Of course the court's answer would be to limit its own term to "pecuniary" concerns. But suppose a stockholder should promise to answer for the debt of the corporation? The courts have held that this promise cannot be said to be an original promise and is therefore within the statute. (Wyman v. Gray, 7 Har. & J. (Md.) 409; Free Schools v. Flint, 13 Met. (Mass.) 539). And yet, under the decision of the court in the principal case, the stockholder would have some personal pecuniary concern in the debt, and the promise would not be within the statute.

It seems to us that the terrible confusion in the decisions which construe this section of the Statute of Frauds is due to an uncalled-for effort on the part of the courts to "pare it down," which is little short of judicial legislation.

THE JURY SYSTEM IN CIVIL CASES.

The writer has read with interest the editorial in the *Central Law Journal* of September 26th, in which, under the caption *"Shall the Jury Be Abolished in Civil Cases?"* the editor comments on the writer's publication in *The Public*. The editorial is slightly misleading. The writer has never advocated the abolition of the jury system in civil cases. He has endeavored to give reasons why it ought not to be resorted to for the adjudication of purely private differences. As a method for settling such differences the jury system is crude, inefficient and expensive, and does not have a tendency to increase public respect for the law or confidence in the courts. A hundred years ago statutes were enacted to encourage and give effect to private arbitrations by providing for the entries of judgments in courts of record based on the awards of abitrators. No one will contend that these statutes abolished the jury system in civil cases. All they did was to provide another procedure for the adjudication of private differences, for those who voluntarily chose to resort to it. Our courts have uniformly encouraged these so-called "domestic tribunals."

The suggestion as to Voluntary Tribunals is simply that these statutory arbitrations be professionalized by selecting lawyers as statutory arbitrators, and adding if the parties so desire one or more expert laymen, as has been suggested by the New York Bar Association. We have here, it seems to us, precisely what the editor desires and forecasts: a development of "the much-beloved institution of the common law" by evolutionary process, because the statutory arbitrators constitute a jury privately selected by the private parties to the difference. Surely the *number* of arbitrators is immaterial. Their *character* is the important thing. Whether the judge be made the thirteenth juror, as the editor suggests he should be, or the third juror, or the sole juror, is unimportant. The important thing is that lawyers do not resort to an inefficient and expensive system, involving great loss of time of parties, witnesses, courts, and juries, when they have it within their power to cheaply and expeditiously secure an efficient, speedy settlement with an approach to scientific accuracy.

In all large industries it is now becoming the practice to apply psychological tests to the matter of the selection of employes, to follow up the great modern system of the subdivision of labor in the mechanical processes of manufacture, by an equally discriminating selection of the appropriate human material for carrying on the minutely subdivided processes. The old haphazard way of "hiring and firing" is being abandoned, and most careful tests are being applied in the big industries to applicants for positions. If one would follow this up, let him read the work on "Employment Psychology—The Selection, Training and Grading of Employes," by Henry C. Link, Ph. D. (The Macmillan Co., July, 1919). Here he will find that even for such work as that of inspecting and gauging shells before they were loaded, most elaborate tests were applied to the girls who were employed at the work. The writer would raise the question whether, when it comes to the admittedly exceedingly difficult process of analyzing evidence which comes from the mouths of witnesses of all sorts and conditions, to drawing inferences and conclusions, to determining what are ultimate facts, and to applying thereto highly technical propositions of law expressed in a language almost foreign to the ordinary juror, the selection of jurors by the ordinary jury commissioner and *voir dire* process is one to which intelligent lawyers of this day and age should resort when there is a clear, open road towards a method which approaches scientific accuracy by the election of a voluntary tribunal made up of experts, whereby the lawyers involved, with the aid of the most discriminative powers they can bring to bear upon the subject, can select their own jury of one, or two, or three, or more, made up of experts in the particular branch of law, or in the particular field of industry or trade involved, or both.

The writer *does* raise the question whether the dragging of purely private differences into public view for settlement is ethical. He *does* raise the question whether the jury-system as applied to the settlement of private differences, with its admittedly crude and often subversive results, tends to increase the public respect for the law. He *does* raise the question whether it tends to elevate the bar. He agrees with the editor in his very forceful statement that: "It is like asking the man on the street to analyze the musical values of a Beethoven sonata to ask a juryman to conform his verdict to the law announced in the instructions." Then why, we ask, continue to do so in cases covered by our arbitration statutes?

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WHAT IS BEER?

What is beer? This is the question which courts and Congress are discussing. To the one familiarly calling it "suds," it is a pleasant, harmless drink. To those who are opposed to all alcoholic beverages, it is only one member of the booze family. It is sometimes called the diamond rattler in the liquor rattlesnake household. Its defenders say that war beer with 2.75% alcohol by weight is non-intoxicating and non-injurious. Alcohol is so diluted they contend, it is impossible to get enough of it in the human system at one time to produce visible signs of intoxication. The human body demands it, its champions say, and the body produces alcohol in small quantities for that need. They claim, therefore, that nature justifies their contention that alcohol is not injurious when used properly.

Beer is an Intoxicant.—Beer is an alcoholic malt beverage.

Alcohol is the determining factor that makes liquor intoxicating. The British Liquor Control Board in November, 1916, appointed an advisory committee to consider the conditions affecting the physiological action of alcohol. This committee, by no means friendly to Prohibition, made its observations from the viewpoint of the control of liquors and how such liquors may be distributed and used with the least possible deleterious effect.

On page 3, the report says:

"Ethylic alcohol.—This is the ingredient of the various beverages known as 'alcoholic liquors,' to which their inebriating properties are almost entirely due. The alcohol in these liquors is, in all cases, produced by the fermenting action of yeast upon sugar * * *. When barley is malted, a ferment is produced, which in the process of brewing, converts the starch of the grain into malt sugar and from this the alcoholic beer is produced by the fermentation with yeast."

Does Beer Intoxicate in the Legal Sense of the Term?—A person is drunk in a legal sense, when so far under the influence of liquor that his passions are visibly excited or his judgment impaired by the liquor.[1]

A man is intoxicated whenever he is so much under the influence of a spirituous or intoxicating liquor that it so operates upon him, that it so affects his acts or conduct or movement, that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man under the influence of liquor to the extent that parties coming in contact with him or seeing him would readily know that he was under the influence of liquor by his conduct, or words, or his movements, would be sufficient to show that such person was intoxicated.[2]

Conditions Determining Intoxicating Effects.—The effect of an alcoholic liquor is not uniform; it varies according to the drinker. The British Liquor Board, in its record, says:

"Not only is there varying susceptibility to alcohol from person to person, and not only does, in one and the same person, the susceptibility differ according to circumstances, digestive and other, under the same dose; but intellectual self-criticism and control are strong in one person, weak in another, and in the same person, while strong in respect of certain kinds of acts, may be weak in respect of certain others."

On page 91, the Liquor Control Board, in discussing "Tolerance," says:

"Moreover, as a result of continual use, some degree of tolerance can be acquired, so that the habitual drinker is often able to consume, without becoming obviously intoxicated; quantities of alcohol which would cause well-marked drunkenness in a person unaccustomed to the drug."

The Age of the Drinker Must be Considered in Determining the Effect of the Liquor.—A young person is more susceptible to the intoxicating effects of alcoholic liquors than an older person. It is not necessary to present any lengthy argument on this point. Legislation for years has recognized

(1) State v. Pierce, 21 N. W. 195, 197, 65 Iowa 85.

(2) Sapp. v. State, 42 S. E. 410, 411, 116 Ga. 182.

the fact that intoxicating liquor has a more definite effect upon a child than a grown person. For this reason, many of the states have prohibited the sale of intoxicating liquors to minors. Other states have prohibited the giving away of intoxicating liquor to people under the age of sixteen years. In still other states the safeguards have been thrown around even the use of alcoholic liquors for medicinal purposes to minors or children. The age of the person and his physical development has a direct relation to the toxic effect of any alcoholic liquors. Horton and Stille, in their work on medical jurisprudence, call attention to the different amounts of alcohol that have produced death in children and grown people. Every standard medical and legal authority on this question recognizes this distinction.

The Amount of Alcohol in the Beverage and the Frequency of the Drink has a Direct Bearing on the Effect.—All are agreed that liquor with a large per cent of alcohol in it will intoxicate. It has been questioned whether a liquor with a small per cent of alcohol in it can produce the same effect if a larger quantity is consumed so that the same amount of alcohol is in the larger volume.

It does take scientific demonstration to conclude that one-third more of volume of 3 per cent beer will produce practically the same effect as a given amount of 4 per cent beer. In other words, if four glasses of 4 per cent beer will intoxicate, five and one-half glasses of 3 per cent will intoxicate, if it can be consumed within the time for the necessary amount of alcohol content ration in the blood to produce intoxication. There is no controversy on the point that a given amount of alcohol in the blood will produce intoxication. There is a division of opinion as to what amount is necessary to produce visible intoxication.

The General Health and Habits of the Drinker have a Bearing on the Effect of the Liquor.—It is generally admitted that an habitual drinker can consume more liquor without showing signs of intoxication than a person not used to drinking. There is no dispute on this point. It logically follows, therefore, that the testimony of an habitual drinker or his experience is not a safe guide in determining the effect of alcoholic liquor. The constant use of the drug alcohol makes him an alcohol drug addict, and he is immune to the normal effect of alcohol on a person free from the habit.

It is not necessary that the amount of alcohol sufficient to cause drunkenness be taken into the stomach at one time.

The rate of absorption of alcohol into the blood is faster for a time than the rate of its destruction (oxidation).

"Ordinary amounts of alcohol in any dilution are quickly absorbed and will usually have disappeared from the stomach in less than half an hour."—*Bastede.*

"The absorption of alcohol occurs rapidly, mainly from the small intestines, and is practically independent of the quantity. Vollmering (1912) is cited as finding absorption practically complete in one hour."—*Sollman.*

But the ***destruction*** (oxidation) of alcohol requires several hours.

"Those who are accustomed to alcohol oxidize it in 7½ hours; whereas, those who have been abstainers require twice that time. Voltz and Districh are cited (1914) as giving a day 2 cc. of alcohol per kilogram of body weight, finding that after 10 hours only 73 per cent of it had been oxidized. About 90 per cent was oxidized in 15 hours and from 18-20 hours were required for the complete oxidation."[3]

Bastede and Sollman agree that alcohol is quickly absorbed, giving as the time of absorption from half an hour to an hour, whereas it is a scientific fact that the *destruction* (oxidation) of alcohol requires several hours. Lusk, in "Science of Nutrition," says: "Those who are accustomed to alcohol oxidize it all in seven and a half hours, whereas those who have been abstainers require twice that time."

(3) (Lusk) Science of Nutrition, 1917, p. 357.

If, therefore, continued drinks of an alcoholic beverage are taken before oxidation of the alcohol in earlier drinks is completed, it would appear that it would be possible to introduce amounts of alcohol that would produce signs of intoxication even with beverages of mild alcoholic strength, especially with persons not accustomed to its use. The more rapid oxidation of alcohol by those accustomed to its use may be one explanation of the fact that alcoholics taking habitually large amounts of "war-beer" (2.75% by weight) show no conspicuous signs of drunkenness.

With regard to this Dr. Harvey, noted food expert, in an affidavit read before the sub-committee of the committee on the judiciary of the United States Senate in the recent hearing on the law enforcement bills, stated:

"The effect of alcohol on the human animal is always toxic, no matter how small the amount nor what its degree of dilution. The visible signs of intoxication are not produced by the last drink, but depend upon all that have preceded it for many hours. Thus, the first drink is as much the cause of the visible intoxication as the last. The effect of alcohol in the liquid drunk is cumulative; it is not necessary in order to produce intoxication that the human stomach should hold at any one time a liquid containing a sufficient amount of alcohol to produce signs of intoxication; the effect of alcohol remains in the human system and the water passes through it; the continued consumption of alcoholic liquors, even with a low per cent of alcohol, will produce intoxication.

"Beer, which is a malt liquor containing 2.75% alcohol by weight, which equals 3.3% alcohol by volume, has a sufficient amount of alcohol to intoxicate an average person in the quantities often consumed. With this amount of alcohol in the liquor many people could consume enough to produce intoxication by the amount which could be held in the stomach at one time. The walls of the stomach are very distensible and greater quantities than a quart of liquid may be consumed by many people within a few moments."

A great deal has been published about the brewers' affidavits and "proofs" that 2.75% beer does not intoxicate. But not so much has been printed about the sworn testimony of chemists and physicians as to the intoxicating qualities of "war-beer" presented at the hearing in Washington.

Dr. William Geagly, assistant for the food and drug department of the State of Michigan testified that he personally had experienced the intoxicating effects of such beer and knew it to be intoxicating by reason of many analyses conducted for criminal cases in the state.

Dr. Abel R. Todd, connected with the Michigan State Food & Drug Department, presented an affidavit to the same effect; and Dr. Howard A. Kelly of Johns Hopkins Hospital, Baltimore, one of the foremost men in his profession, made the following statement: that he has "noted that individual people vary enormously in their susceptibility to alcohol, and that the reason for drinking the beverage is not the bitter nor the malt, but to secure the sensible benumbing effect of the alcoholic drug and that the habitue will drink enough bottles until he secures this effect." He also declared that a half ounce of alcohol contained in the ordinary size bottle of 2.75% beer (by weight) is far more than enough to disturb the balance of judgment of an average, normal, sensitive person taken on an empty stomach. "I consider no beer safe," said Dr. Kelly, "above one-half per cent of alcohol by volume, which would mean about three-fourths of a teaspoonful of alcohol to an ordinary bottle of beer."

Dr. Arthur Dean Bevan of Chicago, president of the American Medical Association, gave the following sworn testimony which was presented to the committee:

"The question as to whether beer containing 2.75% alcohol is intoxicating or not is not a matter of scientific medical opinion, but a matter of common knowledge and common sense. It is a matter of common knowledge that beer which has been here-

tofore sold in the United States, containing from 3.5 to 4.25% alcohol, is definitely intoxicating, and that an individual can get drunk on a limited number of bottles of such beer. If, for example, the ordinary individual became more or less intoxicated on half a dozen bottles of beer which contained from 3.5 to 4.25% alcohol, it is a perfectly plain common-sense proposition that the same individual would become just as intoxicated by drinking, instead of six, say eight bottles of beer containing 2.75% alcohol. There can be absolutely no doubt but that beer containing 2.75% alcohol is an intoxicating beverage and that an individual can become drunk on the amount that is frequently consumed."

The case was further strengthened by an interesting analysis of beer intoxication presented by Dr. Reid Hunt, professor of pharmacology in the Medical Department of Harvard University, who has acted as expert for the Department of Agriculture and made several studies of the effects of alcohol published in American and European medical journals. After citing the Dodge & Benedict experiments, which gave conclusive scientific proof that even slight quantities of alcohol affected the nervous system and left its reflex on the eye and speech organs and impaired skilled movements, he said:

"If, by the term "intoxicating liquor" is meant a liquor which contains sufficient alcohol to cause, when the liquor is taken in amounts which are not unusually taken by men, distinct effects upon the nervous system, the effect being characteristic of and due to the contained alcohol, I am of the opinion that beer containing 2.75% by weight of alcohol should be classed as an intoxicating beverage."

Why Legislative Bodies Prohibit Non-intoxicating Beverages under Authority to Prohibit Intoxicating Liquors.—Prohibition laws do not define intoxicating liquors so as to makes the definition of the term conform to what is required to produce visible intoxication. It would be impossible to fix such a standard, for the reasons heretofore mentioned. Legislatures define the term "intoxicating liquors" in a form to make effective the purpose of the original prohibition act. In order to do this, the law must prohibit the subterfuge and alcoholic camouflages that make the enforcement of the law difficult. It is fundamental that the legislative body must have the power to make its own laws effective, otherwise laws that are placed on the statute books would be non-enforceable.

The main question in determining the validity of such a law is, does the definition have a reasonable relation to the admitted purpose in the prohibition act? In determining this, the courts take into consideration the fact that the purpose of prohibition laws is to discourage and prevent the consumption of intoxicating liquor for beverage purposes. The courts also take into consideration the lawless character of the traffic, and the necessity of adopting extraordinary measures. Both the courts and legislative bodies recognize these fundamental principles, and are rightly influenced by them.

Justice McReynolds, in rendering the opinion in Crane v. Campbell,[4] said:

"And considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

The Supreme Court of Ohio, in deciding whether or not beer containing four-tenths of 1 per cent alcohol was intoxicating, said:[5]

"The legislature may have heard of 'Bishop's beer,' 'Friedon beer,' and later of 'near beer,' and concluded that the enforcement of the will of the majority should not be defeated by subterfuge or the juggling in percentages of alcohol, and has said that, for the purpose of carrying out the intention of the people to prohibit the sale of intoxicating liquors, certain beverages shall be legally considered intoxicating, although not so in fact, and malt liquor is one of

(4) 245 U. S. 304.
(5) 83 Ohio State 68.

these so designated. 'Near beer,' being a malt liquor, the statute pronounces it an intoxicating liquor and made proof of its real intoxicating qualities unnecessary. It is no more protected than 'altogether' beer, and the attempt to evade the law by brewing a 'near' or 'almost' beer is, by section 3, supra, rendered futile.

In the case of United States v. Cohn, in the Court of Appeals of Indian Territory,[6] the court said:

"No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter."

In the case of Feibelman v. State,[7] the court said:

"But if the prohibition should go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions and there would arise such difficulties of proof that the law could not be effectively executed."

All of these decisions are based upon the principle that legislative bodies may enact any laws necessary in order to make the original prohibition effective and prevent the evasions of the law by liquor dealers.

Thirty-three prohibition states and thirteen local option states have defined the term "intoxicating liquor" and "included in the definition alcoholic liquids which are not in fact intoxicating. Similar laws have been passed by Congress to prevent the sale of liquor to Indians for the District of Columbia and Alaska. The courts have uniformly sustained these laws as valid enactments. Congress has defined the term "intoxicating liquor" under National Prohibition, to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto, and other spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." Precedent and good reason fully justify Congress in taking this action.

(6) 32 S. W. Rep. 38 (2) Ind. Ter.
(7) 130 Ala. 112.

WAYNE B. WHEELER.
Washington, D. C.

BAIL—GARNISHMENT.

KELLOGG v. WITTE.

Supreme Court of Washington, July 29, 1919.

182 Pac. 570.

Money deposited as cash bail in the hands of a justice of the peace prior to passage of Laws 1919, p. 153, was not in custodia legis, and was held by the justice in his individual, rather than in his official, capacity, and was subject to garnishment.

TOLMAN, J. On October 7, 1918, appellant, as plaintiff below, filed a complaint against the defendant, respondent here in the superior court for King county and on the same day caused a writ of garnishment to issue in said cause, directed to Otis W. Brinker, justice of the peace for Seattle precinct, directing him to appear and answer as to what money or property he had in his possession or under his control belonging to and what indebtedness, if any, he owed to, respondent. The garnishee defendant answered, on October 10th, that he had in his possession the sum of $1,500, deposited with him as such justice of the peace by the respondent, as bail for one F. B. Witte and one Francis Bernard Witte, in two certain criminal actions then pending before him, in which the state was plaintiff and the said Wittes were respectively defendants. On October 17th, respondent appeared specially, and moved to quash the writ of garnishment on the grounds that the fund in question was not subject to garnishment, and that the garnishee defendant was not subject to garnishment. Thereafter appellant sued out and caused another writ to be served upon the garnishee defendant whose answer, to the second writ was the same as the answer to the first, and, in addition, set forth that the criminal proceedings in which the money had been deposited

as bail were dismissed subsequent to the service of the last writ upon him, but prior to the making of the answer thereto. Respondent, maintaining his special appearance, moved to quash the second writ upon the same grounds as set forth in his motion to quash the first, and both motions were heard at the same time, resulting in an order granting both motions and quashing both writs; from which order this appeal is taken.

The action of the trial court seems to be based upon the theory that money deposited as cash bail in the hands of a justice of the peace is in custodia legis, and for that reason is not subject to garnishment. But it is contended here that a justice of the peace has no authority to accept money in lieu of bail, and if he does accept it, having no authority to do so officially, he holds the funds as an individual and for the owner, who may recover by suit if a voluntary return be denied. It seems to be generally held that—

"In the absence of statute conferring such right, a magistrate or officer has no authority to accept a deposit of money in lieu of bail." 6 C. J. 1023.

To the same effect are 5 Cyc. 114, and Brasfield v. Mayor and Aldermen of Milan, 127 Tenn. 561, 155 S. W. 926, 44 L. R. A. (N. S.) 1150, to which case is appended a note exhaustively reviewing the authorities, the great weight of which supports the text above quoted. Our statute with reference to bail before a magistrate is as follows:

"The magistrate before whom such accused person shall be brought, when the offense is bailable, may, at the request of such person, with or without examination, allow him to enter into recognizance, with sufficient sureties, to be approved by the magistrate, conditioned for his appearance in the superior court having jurisdiction of the offense."

Nor had we, prior to the act of 1919, hereinafter referred to, any statute relating to bail before a justice of the peace or magistrate, providing any other or different method of giving it. The only statute which we then had on the subject of cash bail in criminal actions was Rem. Code, § 2089, which reads as follows:—

"The defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to answer the sum of money mentioned in the order; and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody."

A reading of this section, and especially in connection with its context in the act of 1854 (L. 1854, p. 114, § 80), of which it formed a part, at once suggests that it applies only to proceedings in the superior court; and this court has so held in McAlmond v. Bevington, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597. Chapter 76 of the Laws of 1919, p. 153, which was enacted after the termination of the proceedings below, and has recently gone into effect, provides that justices of the peace and committing magistrates may accept money as bail; but it has no retroactive effect, and we must therefore hold that, at the time the writs were served, the garnishee defendant held the money described in his answers, in his individual, rather than in his official, capacity.

The order appealed from is reversed, with directions to proceed in harmony with the views herein expressed.

HOLCOMB, C. J., and MITCHELL and MACKINTOSH, JJ., concur.

NOTE—*Money Deposited as Bail Not Garnishable.*—It is not the theory of attachment and garnishment statutes that one holding the property or effects of another as an officer, so that his holding is one *in custodia legis*, is alone the reason why it may not be subjected to such process. If effects are in the hands of a third person not with the consent of the owner or through mistake as to his rights, there ought not to be intervention of a third person's rights, based however firmly these may be on a claim of duty by the owner of the property to the third person.

Where it was ruled contrary to this view, it was said: "The recorder (of a city) in accepting the deposit of money, instead of taking bail acted officially, or attempted so to act, without authority of law, hence his action was void in law and the money remained the property of McClellan (judgment debtor) in his hands." The court then proceeds and holds this money was received *colore officii* and the money was said to be subject to judgment creditor's demands, in a suit against the recorder (Stevens). Not a word is said about the rights of judgment debtor. The reasoning is by no means convincing. Eagan v. Stevens, 39 Hun. 311.

And it has been held that where a statute provided for a deposit in lieu of bail in the hands of a particular officer and it was deposited with another having no authority to receive it, the purpose will be effectuated where one was released because of such deposit. Com. v. Leech, 103 Ky. 389, 45 S. W. 361. And where a sheriff acts without authority in receiving money in lieu of bail, yet though there is no statute for any cash bail, it is proper to treat the money as if it had been recovered on a recognizance. Rock Island County v. Mercer County, 24 Ill. 35.

And where one deposits money with a sheriff in lieu of a bond and thereby procures the discharge of a prisoner, it has been said there is a flagrant violation of law and as the depositor participated in such violation "he has no right to recover this money back" from the officer with whom it was deposited. Smart v. Cason, 50 Ill. 195. We believe it often has been held that a garnishing

creditor cannot recover where the principal defendant has no right of action. Where a father to secure release of his son made a cash deposit with a sheriff and the son failing to show up, the father sued the sheriff, who had paid the money into court, it was said: "Although this money was not paid as a bribe, it was left as an indemnity to procure the release of the prisoner, and plaintiff contributed to the breach of the law. It then follows that, as plaintiff contributed to the wrongful discharge of the prisoner, and has thus assisted in obstructing justice, he has no right to recover this money back." Cooper v. Rivers, 95 Miss. 423, 48 So. 1024.

In City of Columbus v. Dunnick, 41 Oh. St. 602, where a cash deposit was made by one arrested for violating a city ordinance, and having defaulted in appearing, it was held a good defense to an action against the city that it had been forfeited as bail and disbursed in due course, and therefore the money could not be recovered in garnishment on attachment. It was said: "D having failed to show that S was his debtor at the time of the deposit, and that it was made in fraud of any creditor, the trial court should have rendered judgment for the city."

In Reinhardt v. City of Columbus, 49 Ohio St. 257, 31 N. E. 35, it appears that one arrested under an ordinance made a deposit in lieu of bail. The money was paid into the city treasury, and afterwards depositor sued the city for the money. The burden was said to be on the city to show that the circumstances were such as justified arrest by the officer without a warrant, and failing to do this there would be deemed an involuntary payment, and plaintiff entitled to recover. This by every inference is a confirmation of Columbus v. Dunnick, *supra.*

It, therefore, seems to us that the instant case was erroneously ruled, and was placed upon too narrow a basis. The true test should be declared to be, whether judgment debtor would be entitled to an action. Also it is suggested that possibly there might be cases where the depositor might recover a deposit, improperly made, when his creditor in garnishment might not. Say, for example, where by fraud or mistake he parted with possession of money. C.

CORRESPONDENCE.

SIMPLIFYING METHODS OF APPEAL IN KANSAS.

Editor, Central Law Journal:

I have read with interest in your number of September 12th, a letter from Mr. D. C. Lewis of Portland, Oregon, commending the use of the case made in appeal. Mr. Lewis assumes that that is still the law in this state. That is not the case. On the contrary, I think we have improved on it.

In 1909 we adopted a new code of civil practice which might well be taken as a model for other states. Coming to the immediate question of appeal, this is our practice at present. Upon the final determination of the cause, the defeated party serves upon the successful party a written notice that he appeals from the decision of the court below to the Supreme Court. This notice may be served upon the opposing litigant or his counsel. Acceptance of service is good, or it may be served by the sheriff. This is filed with the clerk of the district court. The clerk immediately transmits to the clerk of the Supreme Court a certified copy of the journal entry of judgment and of the notice of appeal. Within thirty days the appellant must file with the clerk a bond for costs and a five dollar docket fee. The appeal is then complete; that is all there is to it. No traps, pitfalls or stumbling blocks in the way. The appeal is then docketed exactly as it was in the lower court, except that the plaintiff, if appealing, is called the appellant; if the defendant is appealing, he is called the appellant, so that you see at a glance who was plaintiff below and who won the case, whether affirmed or reversed. None of the old foolishness about the plaintiff in error, respondent, or anything of that sort.

Within four months from the time the appeal is perfected, the appellant must serve upon the opposing party an abstract of the evidence. This abstract is to contain a brief statement in narrative form of the evidence which the appellant thinks pertinent to the appeal. The appellee then has two months to file a counter-abstract. As a matter of practice, and especially among good lawyers, a counter-abstract is very seldom necessary. The court has the power, where there is any dispute, to order up a full transcript of the evidence which is prepared at the cost of the appellant and filed with the clerk of the district court. This abstract saves the Supreme Court an immense amount of labor in wading through surplus evidence, evidence that, by the course of the case, as taken, as nearly often happens, has become entirely surplus to the appeal. In other words, in theory at least and generally in practice, only the meat of the evidence is taken to the Supreme Court that meat upon which the appeal is based. Unless there is a counter-abstract, the briefs are based entirely on the appellant's abstract as to what the evidence was. The abstracts are required to refer to the transcript by page so that if a counter-abstract is filed, or there is any dispute the court may order up a transcript and settle the dispute. This very seldom happens. Our court is liberal in the matter of abstracts. Where appellant's counsel

think that there is a psychological point to be made in showing the examination or cross-examination of the witness, it may be set out in full, but there should always be some object to justify this.

We have had this practice now for nearly ter years, and, while the older and more conservative lawyers first objected to it, I am quite sure that no member of the bar of Kansas would today seek to change it. While the case made was a great improvement on the bill of exceptions, it was still highly technical. It had to be prepared and served within a given time and settled within a given time, and the parties had to appear before the district judge, frequently in some distant county, for the purpose of settling, and it must be done promptly to the minute or the appeal fails. The present system is the least expensive, the most simple of any that I have any knowledge of.

I think the practitioners of other states would do well to examine our system of appeal. I am sure they would come to like it as the bar of Kansas does.

F. DUMONT SMITH.

Hutchinson, Kans.

ITEMS OF PROFESSIONAL INTEREST.

WHAT IS A SUCCESSFUL LAWYER?

At the recent annual meeting of the Illinois Bar Association a contest was held for the best definition of a successful Illinois lawyer.

First prize was won by Charles J. O'Connor, of Chicago, whose definition was "one who masters his case, who gives a fair share of his surplus time to the advancement of jurisprudence, who performs his full duty of citizenship, and who is honest with court, client, opposing counsel and himself."

E. E. Donnelly, of Bloomington, was winner of the second prize with the definition: "One thoroughly qualified, diligently and ethically practicing law as an honorable profession, not to acquire wealth; standing for the highest ideals of humanity and government."

Dean H. W. Ballantine, of Urbana, won the third prize by defining the successful lawyer as "One who well serves the legitimate interests of his clients, aids the work of the courts and makes himself useful to the community."

HUMOR OF THE LAW.

Apropos of Henry Watterson's retirement from *The Louisville Courier-Journal*, a Louisville banker said to the great editor:

"I understand, sir, that your idea is to start a paper of your own—a paper that will strike a new note."

"Well," fenced the veteran, "that would be a welcome change, indeed, for papers nowadays do nothing but note a new strike."

Irvin Cobb was talking to a man who was accused of profiteering in the war. "All I did was what any man would do," said the profiteer, "take advantage of an opportunity."

"Yes," mused Cobb. "That's all Captain Kidd used to do.—*Ladies' Home Journal.*

My friend Jones, while intoxicated, went home and shot at his mother-in-law five times. When I saw him in jail, I said:

"Do you call liquor your friend when it makes you shoot at your mother-in-law?"

He replied: "Liquor is no friend of mine. It made me miss her."

A couple of Kentuckians, meeting in a feud district, one asked the other:

"Look here, Bill, what did you shoot at me for? I ain't got no quarrel with you."

"You had a feud with Ben Walker, didn't you?"

"But Ben's dead."

"Well, I'm his executor."

Vox Populi: "I believe the crooks of this town are protected and instead of rounding up a few burglars we ought to look for the man higher up."

His Wife. "And all this time I've been looking under the bed for him."

An ex-judge had been nominated mayor in a French country district. It soon devolved upon him to sanction a marriage ceremony.

"Do you consent to marry this gentleman, young lady?" he asked amiably.

"Yes," was the reply.

Then, suddenly changing his tone to one of great severity, he said to her proposed husband: "And you, have you nothing to say in your defense?"—*London Opinion.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assignments**—Indebtedness.—If owner is indebted to contractor in an amount greater than the amount of contractor's order to materialman upon owner, and owner accepts and agrees to pay order, she would be liable therefor.—Simpson v. E. C. Payne Lumber Co., Ala., 82 So. 649.

2. **Attachment**—Judgment.—Where there is no appearance by defendant, attachment proceedings are strictly in rem, and the judgment is available only against the property attached. —Blessing v. Blackburn Varnish Co., N. J., 107 Atl. 599.

3. **Burglary**—Unexplained Possession. — That defendant was in the recent unexplained possession of money taken from a house at the time of the burglary warrants a conviction of the burglary.—Tyra v. State, Ala., 82 So. 631.

4. **Bankruptcy**—Chattel Mortgage. — Chattel mortgagor's trustee in bankruptcy may recover property after mortgage had been foreclosed, although mortgagors had interposed no objections to sale.—Simpson v. Combes, Wash., 182 Pac. 566.

5.——Petition for Review.—Proceedings on motion by bankrupt after discharge to reopen estate on the theory that his interest in land had improperly been scheduled as life estate, instead of fee-simple estate, etc., held not to present a controversy arising in bankruptcy, appealable under Bankruptcy Act, § 24a (Comp. St. § 9608), but to be reviewable by petition to revise, under § 24b; it appearing that proceeding was of the most summary character.—Youtsey v. Niswonger, U. S. C. C. A., 258 Fed. 16.

6. **Banks and Banking**—Deposit Slip.—A deposit slip issued by a bank is but prima facie evidence of its receipt of amount of deposit on date shown by slip.—Citizens' Bank of Headrick v. Citizens' State Bank of Altus, Okla., 182 Pac. 657.

7.——Insolvency.—Where stockholders knowing of bank's insolvency sell stock to cashier and are paid out of bank's assets, the effect is withdrawal of stock on account of insolvency in fraud of creditors.—Holyfield v. Davis, Ark., 214 S. W. 53.

8. **Bills and Notes**—Notice of Infirmity.—To constitute notice of infirmity in the instrument or in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. —Ochsenriter v. Block, S. D., 173 N. W. 734.

9. **Boundaries**—Monuments. — Stones, being liable to removal, are not as good evidence of the lines run as are physical objects used as monuments, or located on plats, such as streams, etc., which are permanent in their nature.—Morse v. Breen, Colo., 182 Pac. 887.

10. **Broker**—Del Credere Commission.—The weight of authority is that a broker selling goods on a del credere commission stands in the relation of an original debtor to his principal. —Fletcher v. Fischer, Ore., 182 Pac. 822.

11. **Carriers of Goods**—Filing Rates.—The duly established and filed rates are absolutely binding upon all persons who are parties to a contract of interstate transportation, having the force of a statute, so that they cannot be varied under any pretext and no party can lawfully depart from them.—Union Pac. R. Co., N. Y., 124 N. E. 119, 226 N. Y. 534.

12.——Minimizing Damages.—While it was incumbent on a railroad to use reasonable and convenient care to minimize the damages that resulted from a consignor's tortious act in getting possession of lumber and consigning it, yet it was under no duty to deliver the lumber to the consignee upon its offer to pay the freight without satisfactory indemnity, having been notified by a third person of the tortious act of the consignor.—Louisville & N. R. Co. v. Carmody, Ala., 82 So. 648.

13. **Carriers of Live Stock**—Waiver.—Written notice of claim of damage to interstate live stock shipment within fixed time before removal of stock from place of delivery as a condition precedent to right of recovery, when expressly required by the shipping contract, cannot be waived.—Denver & R. G. R. Co. v. Caddo Realty Co., Colo., 182 Pac. 877.

14. **Carriers of Passengers**—Boarding Car.—One about to board an electric car is not entitled to damages for personal injuries received merely because the car came up to the point of embarkation at an excessive rate of speed, unless such excessive rate of speed was the proximate cause of the injury.—Grubb v. Dunham, Mo., 214 S. W. 256.

15. **Cemeteries**—Public Service Corporations. —Cemetery corporations are in a sense quasi

public service corporations.—Bliss v. Linden Cemetery Ass'n, N. J., 107 Atl. 594.

16. **Commerce**—License.—That a company as to other matters and transactions may be doing business within the state in such manner as to require a license therefore does not prevent the company from performing another valid transaction in interstate commerce which is not subject to state regulation.—Gutta Percha Mfg. & Rubber Co. v. Lehrack, Mo., 214 S. W. 285.

17. **Conspiracy**—Overt Act.—An "overt act" must be something more than evidence of a conspiracy and must be an act done by one party to carry out the intent, and must be such as would naturally effect that result, and at least it must be a step toward execution of the conspiracy.—Williams v. State, Okla., 182 Pac. 718.

18. **Constitutional Law**—Franchise.—While a city council cannot bind its successors in the exercise of the police power, it can, when properly authorized, make a contract for the rendering of public service by corporations in which the rates to be charged are fixed, which contract is no more subject to impairment than the contract of individuals.—City of Watertown v. Watertown Light & Power Co., S. D., 173 N. W. 739.

19. **Contribution** — Guardian ad Litem. — Where testator left annuities to his children with remainder to his grandchildren, and there was no evidence that proposed allowance would decrease annuities, the children were mere volunteers in resisting allowance, and could not recover their legal expenses from trustees, especially where grandchildren's guardian ad litem also resisted proposed allowance.—Johnston v. Moeller, Conn., 107 Atl. 566.

20. **Copyrights**—Domicile.—A native Canadian, who came to New York with the intention of remaining, bringing practically all of his property, held to be domiciled in the United States, within Copyright Act March 4, 1909, § 8 (Comp. St. § 9524), and entitled to the benefit of the Act.—G. Ricordi & Co. v. Columbia Graphophone Co., U. S. D. C., 258 Fed. 72.

21. **Corporations**—Charter Powers.—A corporation organized under the law of this state has no authority to sell its entire property or assets, except as provided by Gen. Code, § 8710 et seq.—Cyclone Drill Co. v. Zeigler, Ohio, 124 N. E. 131.

22.——Nonassessable Stock.—A contract between a corporation and its stockholders that the corporate stock held by them shall be nonassessable may be made, and it is not necessary that such contract be evidenced by the certificates of stock, but it may be proved by any competent evidence.—Reinertsen v. Idaho Power & Concentrating Co., Idaho, 182 Pac. 851.

23.——Public Service Corporation.—The business of a private manufacturing corporation not bein "of the same general character" as that of a public service corporation, the certificate of such a corporation may not, under Stock Corporation Law, § 18, be amended so as to transform it into an electric light corporation.—People ex rel. Cayuga Power Corporation v. Public Service Commission, Second Dist., Ohio, 124 N. E. 105, 226 N. Y. 527.

24.——Trespass.—A corporation is liable in a trespass action for an assault and battery committed by it, but there must be a direct, intentional injury, as distinguished from a consequential injury.—Louisville & N. R. Co. v. Lacey, Ala., 82 So. 636.

25. **Covenants**—Restrictions on Use. — Any reasonable and substantial doubt regarding meaning of building restrictions will be resolved against grantor and in favor of the free use of the property.—Conrad v. Boogher, Mo., 214 S. W. 211.

26. **Criminal Law** — Corroborating Accomplice.—The competency of an accomplice's testimony is governed by the same rules as apply to the testimony of other witnesses.—People v. Flood, Cal., 182 Pac. 766.

27.——Disqualification of Juror.—That some of the jurors in attendance were disqualified to try accused, because they had tried a case against his wife the day before, would not be good ground for a continuance.—Campbell v. State, Ga., 100 S. E. 18.

28.——Expert Witness. — In determining whether a witness is qualified to testify as an expert, the test is whether his knowledge is such that his opinion may aid the jury.—State v. Killeen, N. H., 107 Atl. 601.

29.——Statute of Limitations.—A statute of limitations in criminal cases is to be liberally construed in favor of defendants, as it surrenders the right of the state to try and punish criminal offenses at its discretion.—State v. Fulkerson, Okla., 182 Pac. 725.

30. **Damages**—Prospective Profits.—A moss factory, whose buildings and stock were destroyed by fire set by a spark from defendant railroad's locomotive, was not entitled to the allowance of damages from the loss of prospective profits on the sale of moss.—Palmetto Moss Factory v. Texas & P. Ry. Co., La., 82 So. 700.

31. **Deeds**—Alteration.—No alteration of a deed after it has once been delivered will affect grantee's title, though alterations are made with consent of the parties.—Engstrom v. Peterson, Wash., 182 Pac. 623.

32.——Delivery.—An essential to a valid delivery of a deed is that grantor should have intended finally to part with title.—Meeker v. Spencer, Cal., 182 Pac. 782.

33.——Laws and Usages.—Deed will be construed according to laws and usages of state in which the land is situated.—Liles v. Pitts, La., 82 So. 735.

34. **Divorce**—Alimony.—A husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony.—Weyer v. Weyer, Cal., 182 Pac. 776.

35. **Dower**—Equitable Estate.—Under statutes giving right of dower there may be dower in an equitable estate, but there must be such a right of immediate possession on the part of the husband as to constitute seisin in law.—Murphy v. Booker, Ark., 214 S. W. 63.

36. **Equity**—Clean Hands.—The maxim, "He who comes into equity must come with clean hands," does not apply to wrongs committed at large by those who resort to equity for relief, but is confined to misconduct in the matter in litigation, and must concern the opposite party.—Miller v. Berry, Fla., 82 So. 764.

37. **Estoppel**—Assignment of Franchise.—A city, which, by providing the terms under which

a franchise might be transferred from one gas company to another, consented in advance to the transfer under the terms stipulated, cannot be said to be a stranger to the assignment of the franchise, to bring it within the rule that strangers to a deed cannot avail themselves of estoppel arising therefrom.—City of Shreveport v. Southwestern Gas & Electric Co., U. S. D. C., 258 Fed. 59.

38.——Easement.—Where a real estate company represented that it would build only a boardwalk between lots and ocean, and a purchaser relied on such representations, the sale subjected the intervening land to a permanent easement in favor of lots sold to plaintiff, except that defendant might erect a boardwalk thereon, and defendant is estopped from asserting title to or selling such land.—Phillips v. West Rockaway Land Co., N. Y., 124 N. E. 87, 226 N. Y. 507.

39.——Inurement of Title.—If one having no title conveys lands by express warranty or by warranty which the law implies from the use of the words "grant, bargain, sell and convey," and thereafter acquires title, such title will inure and pass eo instanti to his vendee.—Porter v. Henderson, Ala., 82 So. 668.

40. **Exemptions**—Intent to Claim.—One engaged in occupation entitling him to hold certain tools and implements exempt from legal process cannot, by mere unexecuted intention to change his calling, unaccompanied by any overt act, acquire right to claim exemption as to equipment to be used in such calling.—State Bank of Kingman v. Shepherd, Kan., 182 Pac. 653.

41. **Fraud**—Benefits.—Recovery may be had from one who makes false representations of a material fact with an intention to induce the person to whom it is made, in reliance upon it, to do or to refrain from doing something to his pecuniary injury, when such person, acting with reasonable prudence, is thereby deceived and induced to do what he otherwise would not have done, although the person making the representations received no part of the proceeds of the transaction and was not benefited in any manner thereby.—Watkins v. Bowyer, S. D., 173 N. W. 745.

42.——Deceit.—The law requires good faith in every business transaction, and does not allow one party to intentionally deceive another by making false representations or by concealments; the party so doing being liable in deceit for damages.—Sanders v. Berry, Ark., 214 S. W. 58.

43. **Garnishment**—Custody of Law.—Money deposited as cash bail in the hands of a justice of the peace prior to passage of Laws 1919, p. 153, was not in custodia legis, and was held by the justice in his individual, rather than in his official, capacity, and was subject to garnishment.—Kellogg v. Witte, Wash., 182 Pac. 570.

44. **Gifts**—Conditional.—Where owner agreed that adjoining owner could have certain tract of land if he was lawfully entitled thereto, adjoining owner's action in fencing the tract of land did not entitle him to assert title to the land, since agreement that he could have land was conditioned on fact that it belonged to him.—Newkirk v. Newkirk, Mo., 214 S. W. 169.

45.——Deposit in Bank.—In order that a deposit of money in a bank to the credit of another person shall operate as a valid gift inter vivos, it must appear that the depositor intended a gift, that he executed his intention, and there must be an acceptance by the donee, but where the gift is to an infant, and is beneficial, the law will presume acceptance.—McKinnon v. First Nat. Bank, Fla., 82 So. 748.

46.——Reversion.—Donation, by large producers of cane in the neighborhood, of land, that the donee shall construct thereon a refinery, providing that if donee fails to use the land for the purpose it shall revert to the donor, requires continued maintenance; and acts of donee on refinery being largely destroyed by fire, indicating clearly abandonment of all idea of reconstruction, donation may be revoked.—Segura Realty Co. v. Segura Sugar Co., La., 82 So. 684.

47. **Homicide**—Aiding and Abetting.—Presence and participation in killing a human being is not evidence of consent and concurrence in perpetration of act by defendant charged with aiding and abetting in the killing unless he had a felonious design or participated in felonious design of the person killing.—Mills v. State, Ga., 100 S. E. 32.

48.——Bringing on Difficulty.—One who was at fault in bringing on a difficulty, or fought willingly, cannot invoke the doctrine of self-defense in a prosecution for assault with a weapon or assault and battery, until or unless he has made a bona fide retirement from or an abandonment of the difficulty, and the difficulty has been renewed by the other party.—Love v. State, Ala., 82 So. 639.

49.——Dying Declarations. — Getting deceased's statements and then reducing them to what the county attorney called "the substance," which the deceased signed by mark after hearing it read, was hardly a compliance with the law as to dying declarations.—Walker v. State, Tex., 214 S. W. 331.

50.——Reducing Grade of Guilt.—A state of intoxication which will reduce homicide from murder to manslaughter in the first degree must be of such character and extent as to render defendant incapable of entertaining a design to effect death, in view of Rev. Laws 1910, § 2313, defining murder.—Chambers v. State, Okla., 182 Pac. 714.

51. **Husband and Wife**—Coercion.—Common-law doctrine that wife was under the protection, influence, power and authority of husband, and that she is presumed, while in his presence, to have acted in obedience to his will or under his coercion, has not been changed by statutes relative to married women and their property rights.—Braxton v. State, Ala., 82 So. 657.

52.——Imputability. — Neither laches nor estoppel in pais is as to her real property imputable during the life of her husband, to a married woman who was under disability of coverture when the amendment of 1889 to the Married Woman's Act took effect.—Powell v. Bowen, Mo., 214 S. W. 142.

53. **Indemnity.**—Joint Tortfeasor. — Though the owner of premises failed to maintain them in a reasonably safe condition for use of employes of a corporation invited to do business thereon, the corporation cannot recover from the owner the amount it paid as damages for injuries to employe, where some independent negligent act of the corporation contributed to the accident, so that it became a joint tort-feasor with the owner.—Alaska Pac. S. S. Co. v. Sperry Flour Co., Wash., 182 Pac. 634.

54. **Injunction**—Trade Unions.—Trade unionists will be enjoined from boycotting plaintiff drayage concern because it would not insist upon its employes joining a teamsters' union.—Auburn Draying Co. v. Wardell, N. Y., 124 N. E. 97, 227 N. Y. 1.

55. **Insurance**—Accident.—Under an accident insurance policy, there was "loss of the entire sight of one eye," where insured's eye became incurably sightless and useless, although a slight light perception still remained.—Watkins v. United States Casualty Co., Tenn., 214 S. W. 78.

56.——False Statement.—False statement in proof of loss that insured was owner in fee of insured property ought not of itself to avoid policy, where insurer was fully aware that insured was not the owner in fee, and hence could not have been misled by such statement.—Pearman v. Farmers' Mut. Fire Ins. Co. of Chariton County, Mo., 214 S. W. 292.

57. **Judgment**—Collateral Attack.—Judgment of conviction is conclusive, and may not be impeached by collateral attack unless void.—State v. Dereiko, Wash., 182 Pac. 597.

58.——Special Findings.—That findings do not support a judgment given does not render the judgment void on collateral attack.—In re Ross' Estate, Cal., 182 Pac. 752.

59. **Landlord and Tenant**—Oral Lease. — Under an oral lease of a tenement, there is no implied agreement that the demised premises are or will continue to be fit for occupancy; the

tenant taking them as he finds them.—Bergeron v. Forest, Mass., 124 N. E. 74.

60. **Libel and Slander**—Public Officials.—A newspaper's discussion regarding alleged brutal treatment of prisoners at a state penitentiary is a matter of "public interest," within the rule that comment on public acts of public officials is qualifiedly privileged.—McClung v. Pulitzer Pub. Co., Mo., 214 S. W. 193.

61. **Licenses**—Constitutional Law. — A city ordinance regulating laundries and providing for inspection thereof prior to issuance of a license, held not to violate any provision of the state or federal Constitution.—Yee Bow v. City of Cleveland, Ohio, 124 N. E. 132.

62. **Limitation of Actions**—Running Accounts. —The civil law doctrine of compensation is applied only in cases of running accounts between merchants and by analogy to running accounts between other parties, and does not apply to a claim by a debtor to his creditors, who had purchased property at a prior execution sale for much less than its value.—Nelson v. Gulf, C. & S. F. Ry. Co., Tex., 214 S. W. 366.

63. **Malicious Prosecution**—Motive.—Any motive which prompts the commencement of a criminal prosecution other than to bring the accused to justice is malicious.—De Lamater v. Little, Idaho, 182 Pac. 853.

64. **Master and Servant**—Assumption of Risk. —A section hand assumes the risk occasioned by the known negligence of the foreman in ordering him to remove a lever car from a track used by a fast train, which strikes the car.—Southern Ry. Co. v. Simmons, Ga., 100 S. E. 5.

65.——Simple Duties.—The Master may leave to the servant the performance of simple duties, such as placing a piece of boiler iron on a low pile of scrap iron without warning the servant of the danger of the iron slipping from the pile. —Bennett v. Harry Benjamin Equipment Co., Mo., 214 S. W. 244.

66.——Warning.—If a foreman fails to exercise ordinary care to ascertain whether a pole is reasonably safe to be climbed and orders a lineman to climb it and remove wires, the employer is liable for lineman's injuries by the breaking of the pole.—Bradford v. City of St. Joseph, Mo., 214 S. W. 281.

67. **Negligence**—Joint Tort-feasors. — The joint owners of a private telephone line in a dilapidated condition, and hanging into a field so that it strangled a colt, were joint tort-feasors, each liable for the damages to the owner of the colt.—Hendrix v. Corning, Mo., 214 S. W. 253.

68.——Proximate Cause.—A negligent act, to be the proximate cause of the injury, must have been such that without it the injury would not have happened; it not being sufficient that it merely contributed to the injury.—Ross v. Smith & Bloxom, Wash., 182 Pac. 582.

69. **Novation**—New Contract.—In every novation it is essential that the new contract in which there is a substituted debtor shall be valid, that all parties thereto must agree to the substitution of the new contract and debtor, and that the old contract be a valid one and extinguished by the giving of a new contract, and when such is the case the substituted obligation is a new contractual relation and one in which the old obligation is in no way concerned.—Burford v. Hughes, Okla., 182 Pac. 689.

70. **Nuisance**—Abatement.—As a general rule, courts of equity may give relief against private nuisances, by compelling an abatement, or by restraining the continuance of the existing nuisance, or enjoining the commission or establishment of a contemplated nuisance.—Town of Rush Springs v. Bentley, Okla., 182 Pac. 664.

71. **Partnership**—Dissolution.—Where a partnership is dissolved, and one partner assigns to the other all of his right, title, and interest, he may institute an action against a tort-feasor for the entire damage sustained by the partnership.—Sullivan v. Curling, Ga., 100 S. E. 26.

72.——Good Will.—A partner who personally owned a grain elevator could not sell, along with a conveyance of the building, the good will of the partnership business carried on therein. —Kidder Equity Exch. v. Norman, S. D., 173 N. W. 728.

73.——Surviving Partner.—Failure of surviving partner, who desired to buy deceased partner's interest at lowest possible price to disclose to deceased partner's executrix that appraisal of firm property was about 40 per cent too low was a clear breach of trust.—Cotton v. Stevens, N. H., 107 Atl. 602.

74. **Party Walls**—Termination of Easement. —When the state of things which results in a contract for a particular party wall ceases and the right to continue an obligation for a party wall as between the owners of the adjoining property is not provided for by contract, the easements terminate.—Bull v. Burton, N. Y., 124 N. E. 111, 227 N. Y. 101.

75. **Patents**—Monopoly.—A patentee receives nothing from the law which he did not have before; the only effect of his patent being to restrain others from manufacturing, using, or selling that which he has patented, the purpose of the patent law being to protect him in his monopoly.—Crystal Percolator Co. v. Landers, Frary & Clark, U. S. D. C., 258 Fed. 28.

76.——Ornamental Design.—A design may be "ornamental," within Comp. St. § 9475, authorizing patents for ornamental designs, not in the sense of being ornate or bedecked, but in the sense that it has a certain marked appearance which lends beauty or elegance to it.—H. D. Smith & Co. v. Peck, Stow & Wilcox Co., U. S. D. C., 258 Fed. 40.

77. **Pledges**—Foreclosure.—Where one holds notes as collateral to secure a loan, and also holds a mortgage, he may enforce his securities in accordance with the terms expressed in the deed of trust, and need not foreclose his pledges by a sale under an appropriate judgment before foreclosing the trust deed. — Flournoy v. Sprague, Mo., 214 S. W. 183.

78. **Public Service Commissions**—Compensatory Rates.—The fundamental inquiry in fixing rates for public service utility is what rate is necessary to yield a reasonable average return on a fair valuation of the property for rate-making purposes, such a return as will not discourage, but will attract, the investment of capital.—Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, Neb., 173 N. W. 690.

79. **Receivers**—Appointment of. — The appointment of a receiver for a corporation, without notice to the corporation is void, even though made after execution against the corporation had been returned unsatisfied.—Gordon v. Pacific Excursion Co., Wash., 182 Pac. 591.

80. **Release**—Deduction from Recovery. — Where a release for personal injuries is obtained by a fraud, a return or tender of the consideration paid is not a requisite to maintaining an action for damages by plaintiff and upon a judgment for him, it is sufficient if the amount received on the release be deducted from the verdict.—Franklin v. Webber, Ore., 182 Pac. 819.

81. **Sales**—Acceptance.—Where a buyer of a locomotive crane retained the same and used it for a long time, there was an acceptance, even though the buyer asserted in correspondence that it had not accepted the crane, because it did not comply with an asserted warranty.—O. C. Barber Mining & Fertilizing Co. v. Brown Hoisting Machinery Co., U. S. C. C. A., 258 Fed. 1.

82.——Assignability.—A contract to sell and deliver goods may be assigned by the one to whom the goods are to be delivered if there is nothing in its terms manifesting the parties' intention that it shall not be assignable.—Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co., Minn., 173 N. W. 703.

83. **Usury**—Corrupt Intent.—To show usury, evidence must be produced to show a corrupt intent by both the borrower and the lender.—Salvin v. Myles Realty Co., N. Y., 124 N. E. 94, 227 N. Y. 51.

84. **Waters and Water Courses**—Riparian Owner.—While a riparian owner, who has lost his rights by avulsion, may ditch the waters back to its original channel within a reasonable time, he cannot disturb the rights of appropriators, or go upon the land of others for this purpose without their consent.—McKissic Cattle Co. v. Alsaga, Cal., 182 Pac. 793.

85. **Witnesses**—Leading Questions.—The allowance of leading questions is a matter largely within the discretion of the trial court, and where plaintiff was a very old and feeble man it cannot be held that to allow leading questions to be propounded to him was an abuse of that discretion.—Mead v. Mead, Cal., 182 Pac. 761.